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Supreme Court of the United States

October Term, 1994

CATHEDRAL OF JOY BAPTIST CHURCH and REVEREND SAMUEL E. HINKLE,

Petitioners,

v.

VILLAGE OF HAZEL CREST, a municipal corporation, and DIANNA J. CHALMERS, RICHARD J. HEBDA, JOHN E. KAINDL, RONALD J. KELLY, JAMES A. LABEAU, KATHLEEN WITT, Individually and as agents of the Village of Hazel Crest,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONERS CATHEDRAL OF JOY BAPTIST CHURCH AND REVEREND SAMUEL E. HINKLE

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QUESTIONS PRESENTED

1. Whether this Court should resolve the Circuit split created by the Seventh Circuit's holding below that the discovery rule, as applied in race discrimination actions arising under 42 U.S.C. § 1983, requires that the applicable statute of limitations begins to run when the claimant anticipates that he will be injured, as opposed to when he should reasonably discover his actual injury.

2. Whether the issue of whether the claimant in a race discrimination action arising under 42 U.S.C. § 1983 exercised reasonable diligence in discovering his injury is one of law for the court to decide on a motion for summary judgment under Fed. R. Civ. P. 56, or is one of fact for the jury.

LIST OF PARTIES

The parties proceeding below were the Petitioners Cathedral of Joy Baptist Church and Reverend Samuel E. Hinkle and the Respondents Village of Hazel Crest, a municipal corporation, and Dianna J. Chalmers, Richard J. Hebda, John E. Kaindl, Ronald J. Kelly, James A. Labeau, Kathleen Witt, Individually and as agents of the Village of Hazel Crest.

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Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

The petitioners, Cathedral of Joy Baptist Church and Reverend Samuel E. Hinkle, respectfully pray that a writ of certiorari issue to review judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on April 22, 1994.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at *Cathedral of Joy Baptist Church v. Village of Hazel Crest,* 22 F.3d 713 (7th Cir. 1994), and is reprinted in the appendix at page A-1. The opinion of the district court addressing the questions presented by Petitioners Cathedral of Joy Baptist Church and Reverend Samuel E. Hinkle is reprinted at A-12. The magistrate's report and recommendation addressing the questions presented by Petitioners Cathedral of Joy Baptist Church and Reverend Samuel E. Hinkle is reprinted at A-14.

JURISDICTION

The Seventh Circuit affirmed the District Court's decision that petitioners Cathedral of Joy Baptist church and Reverend Samuel E. Hinkle's 42 U.S.C. § 1983 claims were time-barred on April 22, 1994. A-1. This court has jurisdiction to review the Seventh Circuit's decision under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Cathedral of Joy Baptist Church ("Cathedral"), acting *pro se*, filed a civil rights lawsuit against the Village of Hazel Crest ("Hazel Crest") on June 29, 1990. The Complaint alleged racial discrimination and undue interference with Cathedral's freedom of religion, based on Hazel Crest's pattern of denying special use permits to predominantly African-American churches. The Complaint was filed less than two years after Cathedral learned that its special use request was denied, but two years *and one day* after the Hazel Crest Board of Trustees' decision to deny Cathedral's application. On September 30, 1991, the Magistrate Judge issued an interim report and recommendation limiting discovery to the defendant's statute of limitations defense and ordering the defendants to file a summary judgment motion on that issue. The report was adopted in full by the District Court on December 4, 1991. After three months of waiting for the Defendants to comply, Cathedral took the initiative and moved for summary judgment on the issue. The Defendants responded with a motion for summary judgment. On September 15, 1992, the Magistrate recommended that summary judgment be granted in favor of defendants. On January 13, 1993, the District Court adopted the Magistrate Judge's recommendation, stating that "[t]he accrual date is the date on which the Board voted, since the information was readily available to the Plaintiffs and they were on notice that an injury was likely to occur." A-13. Cathedral filed a timely notice of appeal on January 27, 1993, giving the Seventh Circuit jurisdiction under 28 U.S.C. § 1291 and Fed. R. App. P. 4(a). On April 22, 1994, the United States Court of Appeals for the Seventh Circuit affirmed the District Court's decision, holding that Cathedral's claim was time-barred.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant The Writ To Resolve The Circuit Split Created By The Seventh Circuit's Holding Below That The Discovery Rule Requires That The Applicable Statute Of Limitations Begins To Run When The Claimant Anticipates That He Will Be Injured, As Opposed To When He Should Reasonably Discover His Actual Injury

A. Background Of The Seventh Circuit's Creation Of An Unprecedented Standard For The Discovery Rule

On April 1, 1988, Reverend Samuel E. Hinkle applied on Cathedral's behalf to the Village of Hazel Crest for a special use permit allowing Cathedral to convert a former Ponderosa restaurant in Hazel Crest into a church. (S/C. 74, Ex. B).[1] Cathedral has a predominantly African-American congregation. Hinkle was aided during the application process by attorney Thomas Vaughn. Neither Reverend Hinkle nor Vaughn were residents of Hazel Crest, and neither had prior experience with its zoning procedures. (S/C. 74, Ex. C at ¶ 8, Ex. D at ¶ 8). Along with its application, Cathedral specifically requested that "[n]otices of meetings and/or hearings" concerning its application be sent to its attorney, Thomas Vaughn. (S/C. 74, Ex. B).

A series of zoning meetings ensued. Cathedral received verbal notice from Hazel Crest of the first two meetings, and written notice from Hazel Crest of two succeeding meetings. (S/C. 80, Ex. D; R. 82, Ex. B; R. 61, Ex. E). At the fourth meeting, on June 21, 1988, Hinkle and Vaughn were informed that no final decision would be made at this meeting regarding their request and that their permit application eventually would be heard and decided upon by the Board of Trustees at one of its subsequent formal meetings. (S/C. 74, Ex. C at 5, Ex. D at 5). Hinkle and Vaughn

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1 Documents included in the Record on Appeal transmitted by the District Court are referenced "R", followed by the document number given them by the Clerk of the District Court in the Appendix to his Certificate. Documents transmitted by the District Court under a separate certificate are referenced "S/C".

then left the meeting without waiting for it to formally adjourn and without being informed of the date a final decision would be rendered. (S/C. 74, Ex. C at ¶¶ 6-7, Ex. D at ¶¶ 6-7).

A week later, on the evening of June 28, 1988, the Hazel Crest Board of Trustees held a formal meeting, where it voted to deny Cathedral's request for a special use permit. (S/C. 80, Ex. N at 3). Cathedral did not attend the meeting because Cathedral had not been informed that a formal meeting was scheduled or that a final decision would be rendered at this meeting. Cathedral did not know its application had been denied earlier than July 1, 1988, when Rev. Hinkle read of the decision in a local newspaper. Attorney Vaughn received a letter from the Board of Trustees informing him of the vote on July 1, 1988. (S/C. 74, Ex. C at 9; S/C. 74, Ex. D at ¶ 9; S/C. 80, Ex. S).

Cathedral and Rev. Hinkle, acting *pro se*, filed a civil rights claim alleging that Hazel Crest's denial of Cathedral's zoning application was part of a systematic pattern of denying African-American churches, such as Cathedral, the opportunity to integrate Hazel Crest, thereby violating the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. (Second Amendment Complaint ("Complaint"), R. 17 at ¶¶ 8-24, 28-30). Cathedral and Hinkle also claimed that the unfettered discretion Hazel Crest possessed in granting special use permits was in contravention of 42 U.S.C. § 1983. (r. 17 at ¶¶ 33-35). Also, they alleged that the actions of the Hazel Crest Board of Trustees, which deprived Cathedral and Reverend Hinkle of the full and equal benefit of all laws and proceedings for the security of persons and property as is engaged by white citizens, violated 42 U.S.C. § 1981. (R. 17 at count v). Additionally, Cathedral and Reverend Hinkle claimed that the segregation of religious land uses from other commercial or business land uses, as well as the excessive burden placed on Cathedral and Reverend Hinkle in the zoning process which deprived them of the right to free exercise of religion, violated the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. (R. 17 at ¶¶ 25-27, 36-38).

The Complaint was filed on June 29, 1990; less than two years after Cathedral learned that its special use request had been

denied, but two years and one day after the Board of Trustee's decision (R. 1). The District Court adopted the Magistrate's recommendation and entered summary judgment in favor of the Defendants. The District Court supported its holding by asserting that the Plaintiffs were on notice of probable injury and therefore reasonable diligence required them to ascertain when the final vote would be held. A-13.

The Seventh Circuit concluded that Cathedral of Joy, as a reasonably diligent plaintiff, should have discovered the denial of the special use permit on the day the Village Board acted. In holding thus, the Seventh Circuit asserted that "based on the comments made by members of the various boards during the successive administrative hearings, the church had ample reason to suspect that its application might ultimately be rejected by the Village Board. Reasonable diligence required that some inquiry should have been made *to learn when the Board would act* on a matter of substantial significance to the church." A-13 (emphasis added).

B. The Seventh Circuit Deviated From Other Circuits By Creating A Pre-Injury Reasonable Diligence Standard That Impermissibly Narrows The Scope Of The Discovery Rule

The Seventh Circuit has created an entirely new standard that deviates from other Circuits in its drastic narrowing of the scope of the discovery rule. This issue is tremendously important, has broad implications and merits the Court's review to preserve the consistent application of federal law across the Circuits and the integrity of the discovery rule itself.

As established, the discovery rule is read into statutes of limitations in federal questions. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991). The discovery rule of federal common law is "the rule that postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured...." *Id.* at 450. In Illinois, the statute of limitations for 42 U.S.C. § 1983 claims is two years. *Wilson v. Giesen*, 956 F.2d 738, 740 (7th Cir. 1992).

The Seventh Circuit's interpretation of the discovery rule deviates from the application of the rule which has been established in other Circuits, where the issue is determining when the plaintiff knew or should have known of the injury *after* it occurred.[2] Instead of using the established discovery rule standard of reasonable diligence to determine when Cathedral should have discovered that it *had been* injured, the Seventh Circuit required that Cathedral exercise "reasonable diligence" to determine when they were *going to be* injured. In so doing, the Seventh Circuit essentially required that Cathedral discover its injury *simultaneously* with the occurrence of that injury, thereby negating the application of the rule altogether.

At the very least, this new standard is an unprecedented maximum diligence standard. It subverts the purpose of the discovery rule, which is to effectively mitigate the potential harshness of statute of limitations forfeitures by permitting plaintiffs who exercise objectively *reasonable* diligence in the discovery of an injury to bring their suits in federal courts. "[Statutes of] limitations should not bar a claimant before he has a reasonable basis for believing he has a claim." *Marrapese v. State of Rhode Island*, 749 F.2d 934, 942 (1st Cir. 1984) (*citing Exnicious v. United States*, 563 F.2d 418 (10th Cir. 1977)). *See also Maughan v. SW Servicing*,

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2 *Morse v. University of Vermont*, 973 F.2d 122 (2d Cir. 1992) (holding that plaintiff's claim accrued when University informed her that she was terminated as a candidate for a Master's degree); *Rivera-Muriente v. Agosto-Alicea*, 959 F.2d 349 (1st Cir. 1992) (stating that the key question is when did plaintiff know, or have reason to know that he had been deprived of his unemployment without a pre-termination hearing); *Vernau v. Vic's Market*, 896 F.2d 43, 46 (3d Cir. 1990); *Mullinax v. McElhenney*, 817 F.2d 711, 718 (11th Cir. 1987) (holding that § 1983 action does not accrue until the plaintiff knows or has reason to know that he has been injured); *Lavellee v. Listi*, 611 F.2d 1129 (5th Cir. 1980) (stating that federal law holds that the time of accrual is when the plaintiff knows or has reason to know of the injury which is the basis of the action).

Inc., 758 F.2d 1381 (10th Cir. 1985) (stating that application of the discovery rule is based on balancing the hardship statutes of limitations would impose on the plaintiff against difficulties of proof caused by the passage of time).

Under the Seventh Circuit's interpretation, any time a plaintiff suspects a possible injury, he will have an affirmative duty to investigate the possibility in order to satisfy the reasonable diligence standard. If he fails to discover the injury until after it occurs, even if his actions subsequent to the injury are reasonably diligent, his claim is lost. A Seventh Circuit plaintiff facing this situation is precluded from exercising the prevailing interpretation of the discovery rule in other Circuits; that his claim accrues when he knows or should know he *has* been injured.

This Court should grant *certiorari* and review the Seventh Circuit's decision to stop the stripping away of the protections traditionally afforded by the discovery rule, and to uphold the uniformity in the application of the discovery rule as applied in other Circuits.

C. The Seventh Circuit Renders The Discovery Rule Ambiguous And Difficult To Apply

The Seventh Circuit's new standard infects the discovery rule with ambiguity and harshness. The prevailing interpretation of the rule establishes the injury as the concrete point in time from which to determine when the claim should accrue. *Morse v. University of Vermont*, 973 F.2d 122 (2nd Cir. 1992); *McWilliams v. Escambia County School Board*, 658 F.2d 326 (5th Cir. 1981). The reasonable diligence of the plaintiff is measured by when he should have discovered that the injury occurred. *Id.* The Seventh Circuit's interpretation erases this concrete point and leaves an ambiguous standard in its place, with the focus on vague notions of suspicion and belief. It will be immensely more difficult for potential plaintiffs to know when they need to act in order to preserve their claim and for courts to determine when a cause of action is barred. Numerous questions will arise in applying this standard to various situations. For example, will an employee who feels ill after spending a day in the office have an affirmative duty to investigate the ventilation system of the building that day to preserve his claim?

Cf. In the matter of the Central Railroad Company of New Jersey, 950 F.2d 887, 891 (3d Cir. 1991), *cert. denied, NPM Group v. Benedetto*, 112 S. Ct. 1586, 118 L. Ed. 2d 305 (holding that actual awareness that one has occupational disease is necessary condition for commencing running of limitation period for suit for contracting of such disease), *Urie v. Thompson*, 337 U.S. 163 (1949). Will a woman who has heard various sexist comments in the workplace have to be on alert to any company meetings concerning promotion or termination to ensure that she knows instantly whether her employers are discriminating against her? *Cf. Delaware State College v. Ricks*, 449 U.S. 250 (1980) (holding that statute of limitations did not accrue until plaintiff received final notice of denial of tenure, although Court declared that he had been adequately forewarned by other public actions).

Additionally, when is a plaintiff to assume that she is subject to a reasonable diligence standard in discovering her injury and when must she anticipate she will be held to an advance diligence standard? Will the standard depend on the injury itself or the surrounding circumstances? Will some statutory violations be classified as requiring advance diligence, while others remain under the reasonable diligence standard? These types of difficulties in determining what events suffice to raise suspicion of injury, how the plaintiff should act in anticipating injury, and the lengths he must go to preserve his claim will increase the inconsistencies in the application of the discovery rule within the Seventh Circuit.

The Seventh Circuit plaintiff is put at a relative disadvantage in pursuing his claim as compared to plaintiffs in the other Circuits, where the prevailing interpretation of the rule is applied. The Seventh Circuit plaintiff who fails to anticipate his injury will be forced to forfeit his claim, at least in some as yet undefined cases. This exceedingly harsh result, which is particular to this Seventh Circuit interpretation, effectively punishes the individual who finds it necessary to file his claim there. This Court should intervene to provided guidance on this question.

D. The Seventh Circuit's Requirement Of Pre-Injury Investigation Deviates From Precedents Of The Supreme Court And Other Circuits

This pre-injury investigation requirement also deviates from this Court's holding in the directly analogous case of *Delaware State College v. Ricks*, 449 U.S. 250 (1980) as well as similar holdings in other Circuits. In *Ricks*, the Court held that a teacher's cause of action based on an unlawful decision denying him tenure did not accrue until he received notice of the final decision. *Id.* at 262. This was so even though numerous public actions had been taken regarding plaintiff's tenure status before the formal decision was made, most recommending that Ricks not be granted tenure. The Court considered the plaintiff "abundantly forewarned" that an adverse decision by the College Board of Trustees was imminent and found the decision "entirely predictable" given the prior proceedings. *Id.* at 262 n.16. Nevertheless, the Court held that the plaintiff's cause of action did not accrue until he was notified by letter that the board voted to deny his tenure. In contrast to the Seventh Circuit's opinion in this case, the *Ricks* court did not discuss whether Ricks had ample reason to suspect that he would be injured, and nor did it consider whether he should have discovered when the date and time of the meeting was and attended. *Id.* Under *Ricks*, therefore, even if Cathedral of Joy had reason to suspect its application would be denied, they had no affirmative duty to investigate the potential injury.

The Second Circuit followed the *Ricks* standard of accrual in *Morse v. University of Vermont*, 973 F.2d. 122 (2d Cir. 1992). In *Morse*, the plaintiff claimed that the University's action in terminating her candidacy for a Master's degree was discriminatory under the Rehabilitation Act. In holding her claim time barred, the Court held that "the timeliness of a discrimination claim is measured from the date the claimant receives notice of the discriminatory decision." *Id.* at 125. As in *Cathedral of Joy*, the plaintiff in *Morse* possessed information that conceivably could have aroused her suspicion that her candidacy would be terminated. University policy stipulated that the required course work be completed in 5 years with no mentioned exception for handicapped individuals. *Id.* at 123-24. The plaintiff spent five years at the University

without completing the requirements. Therefore, the termination should have been foreseeable to her according to the University's established policy. Nevertheless, the *Morse* court did not institute a pre-injury investigation requirement, but held that a federal claim accrues when a plaintiff knows or has reason to know of the injury that is the basis of the action. *Id.* at 125. There is no mention of whether the plaintiff has a duty to exercise reasonable diligence to become aware of a potential injury that could occur at some point in the future.

Other Circuits similarily focus on when the plaintiff discovers or should discover the injury *after* it occurs.[3] Because the Seventh Circuit instituted a standard that contradicts both Supreme Court analysis and other Circuits' holdings, this Court should grant *certiorari* and reverse the Seventh Circuit decision.

II. This Court Should Grant The Writ To Resolve The Circuit Split Created When The Seventh Circuit Decided The Issue Of Reasonable Diligence As A Matter Of Law Under Fed. R. Civ. P. 56, Rather Than Treating It As An Issue Of Fact For The Jury

A. Background Of The Seventh Circuit's Resolution Of The Reasonable Diligence Issue As A Matter Of Law Under Fed. R. Civ. P. 56

On September 30, 1991, the Magistrate Judge issued an interim report and recommendation limiting discovery to the defendant's statute of limitations defense and ordering the defendants to file a summary judgment motion on that issue. A-14. The report was adopted in full by the District Court on December 4, 1991. A-12. After waiting three months, Cathedral filed a motion for

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3 *Mullinax v. McElhenney*, 817 F.2d 711 (11th Cir. 1987) (holding that date paralegal became aware of package in inmate's post office box was earliest possible date that §1983 action for entrapment could accrue); *Lavellee v. Listi*, 611 F.2d 1129 (5th Cir. 1980) (stating that under federal law, the time of accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action).

summary judgment on the issue. Hazel Crest responded with the same. Conflicting testimony appeared in the affidavits of Rev. Hinkle and Thomas Vaughn for the petitioners, and the affidavits from the respondent Hazel Crest Trustees. Hinkle and Vaughn swore under oath that they had received notice of all four prior meetings, but were not informed when the final vote was to take place. (S/C. 74, Ex. C at ¶ 5, Ex. D at ¶ 5). The Trustees claimed that Hinkle and Vaughn were at the meeting when the vote was placed on the next week's agenda. (S/C. 80 at 5, Ex. G at ¶¶ 4-5).

The Magistrate Judge issued a recommendation that the issue be resolved in favor of Hazel Crest, asserting that there was no dispute that the date and time of the meeting had been published and that the information was reasonably available to the plaintiffs before that date. The Magistrate set forth a number of facts in dispute without noting the dispute, as when he incorrectly stated that Cathedral conceded they knew the final meeting was scheduled for June 28. A-17.

Cathedral subsequently filed an objection to the Magistrate's report, noting that the focus should have been on whether it acted in a reasonably diligent manner, not whether the information about the meeting was reasonably available. The objection pointed out that reasonable diligence is a question of fact and that summary judgment would only be appropriate "if the facts are so glaringly one-sided that a rational jury could come to only one conclusion, i.e. that a reasonably diligent plaintiff would have discovered his injury before a particular date." R. 97 (*citing Wehrman v. United States*, 830 F.2d 1480, 1484 (8th Cir. 1987)). Cathedral further stressed that they were not notified of this meeting, as they were of the four previous meetings, and that its right to actively participate in the zoning process had been affirmatively terminated. (R. 97, S/C. 74, Ex. C at ¶ 5, Ex. D at ¶ 5; S/C. 74, Ex. C at ¶ 4, Ex. D at ¶ 4). However, the District Court, with some modifications, adopted the Magistrate's recommendation that summary judgment be entered for the defendants. The District Court acknowledged that the discovery rule of reasonable diligence was applicable, but decided as a matter of law that "reasonable diligence would have required Plaintiffs to ascertain when the vote would be held" A-13.

B. The Seventh Circuit's Interpretation And Application Of The Summary Judgment Standard To The Discovery Rule Conflicts With That Of Other Circuits

The Seventh Circuit, in reviewing *de novo* the district court's decision on the summary judgment motion, deviated from other Circuits in its application of the federal summary judgment standard regarding the reasonable diligence question of the discovery rule. By deciding the reasonable diligence issue as a matter of law rather than allowing it to go to a jury, the Seventh Circuit made an end run around the discovery rule, depriving Cathedral of Joy of its right to argue the facts of its diligence to the jury. This result is completely inconsistent with the rule's application in other Circuits, provides for inconsistent application of the discovery rule, and places Seventh Circuit plaintiffs at a relative disadvantage compared to plaintiffs in other Circuits who would have received the opportunity to state their case for reasonable diligence before a jury. Accordingly, the Court should consider this question in order to provided guidance on the issue.

The summary judgment standard is a matter of federal law to be applied in federal courts, whether or not the case rests on diversity jurisdiction. *Rivera-Muriente v. Agosto-Alicea*, 959 F.2d 349 (1st Cir. 1992); *Bieghler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980). In the application of the standard to the discovery rule question of reasonable diligence, other Circuits consistently have held that reasonable diligence is a question of fact to be decided as a matter of law only where there is uncontroverted evidence that the plaintiff should have been aware of the injury and a rational jury could come to only one conclusion.

The First Circuit focused its discovery rule analysis not on whether the plaintiff acted reasonably, but whether a rational jury could find that the plaintiff acted reasonably. *Villarni-Garcia v. Hospital del Maestro, Inc.*, 8 F.3d 81 (1st Cir. 1993); *Rivera-Muriente v. Agosto-Alicea*, 959 F.2d 349 (1st Cir. 1992). Another First Circuit case emphasized that the focus of the discovery rule is to determine whether the plaintiff acted reasonably in uncovering the existence of the injury, not whether reasonable diligence could have

led to discovery of the claim. *Cambridge Plating Co., Inc. v. Napco, Inc.*, 991 F.2d 21 (1st Cir. 1993). The *Cambridge* court held that the issue of whether the plaintiff acted reasonably is inappropriate for summary judgment and should be decided by the trier of fact where the record contained "sketchy information." *Id.* at 30.

The Eighth Circuit, in a discovery rule case, stated that "summary judgment is an extreme and treacherous remedy and should not be entered unless the movant has established its right to a judgment with such clarity as to leave no room for controversy and unless the other party is not entitled to recover under any circumstances." *Foster v. Johns-Manville Sales Corporation*, 787 F.2d 390, 392 (8th Cir. 1986). The *Foster* court reversed the entry of summary judgment for the defendant, holding that conflicting inferences could be drawn from the facts, and therefore the reasonable diligence issue should have been left for the jury. *Id.* at 393.

The Ninth Circuit asserted that the issue of reasonable diligence is generally inappropriate for resolution on summary judgment under federal law. The Ninth Circuit further stated that the diligence question should be treated as a matter of law only when uncontroverted evidence irrefutably demonstrates that plaintiff discovered or should have discovered his injury. *Nevada Power Co. v. Monsanto Company*, 955 F.2d 1304, 1307 (9th Cir. 1992). The *Nevada Power Co.* court reversed the summary judgment order and remanded the reasonable diligence issue to be decided by a jury.

The Tenth Circuit observed that it is the settled law in the majority of circuits that the issue of when a plaintiff should have known of a cause of action is a question of fact for the jury. *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1387 (10th Cir. 1985)

C. The Seventh Circuit's Deviation From Other Circuits In Its Application Of The Summary Judgment Standard To The Discovery Rule Unnecessarily Forfeits Cathedral's Cause Of Action

The consequence of the deviation in summary judgment application becomes evident when considering the circumstances of

this case. Here, the Seventh Circuit justified deciding the reasonable diligence issue as a matter of law by purporting to apply the federal summary judgment standard to the discovery rule. The Seventh Circuit then arrived at the conclusion that the undisputed facts of the case could lead a rational trier of fact to only one conclusion: that the church did not act with reasonable diligence. Summary judgment then was entered in favor of the defendant. Upon examining the Seventh Circuit's reasoning, it becomes apparent that the Seventh Circuit deviated from other Circuits in its application of the summary judgment standard to the discovery rule, and created an inconsistent application of federal law between the Circuits.

The Seventh Circuit ignored the material issues of fact that exist in the record. The following material issues warrant determination by a jury, according to the dictates of the discovery rule. First, the Seventh Circuit asserted that Cathedral of Joy should have suspected that its application would be denied because four of the six Village trustees indicated that they were opposed to the application. A-6. "Based on the comments made by members of the various boards during the successive administrative hearings, the church had ample reason to *suspect* that its application *might* ultimately be rejected by the Village Board." A-9 (emphasis added). However, Cathedral just as easily could have anticipated that there was a chance that at least one trustee would change his mind, leaving the vote tied and sustaining their application. The application was not won or lost until the final vote. A rational jury could find that the church was reasonably diligent in its optimism.

Second, the Seventh Circuit stated as a matter of law that Cathedral acted unreasonably by waiting for written notice of the final meeting, even though Cathedral had received verbal or written notice before each of the previous four meetings and its representatives swore by affadavit that they were not told when the formal meeting would take place. A-8,9. The Seventh Circuit ignored the potentially reasonable inference Cathedral could have made that written notice would be forthcoming because written notice had been given before the last two successive meetings. Crucially, the Court referred to the ambiguous circumstances of the notice question in the same sentence that it decided that the church

was not reasonably diligent as a matter of law. "Under these ambiguous circumstances, we do not believe that the church, and its counsel, exercised reasonable diligence in assuming that a written notice of a date for board action would be forthcoming." A-8,9. Since the Court itself admitted that the situation was not clear, it should not have been decided as a matter of law under any standard.

Third, since Hazel Crest told Cathedral's representatives that they could not participate in the final meeting, a rational jury could conclude that it would have been reasonable for Cathedral to wait until it was notified of Hazel Crest's decision, or to periodically inquire as to whether a decision had been reached. The Seventh Circuit dismissed this argument with the conclusory statement that "because the church's presence was unnecessary for the resolution of the matter and adverse action was certainly a possibility, the motivation to determine when the Board action would be taken should have been heightened, not diminished." A-9. The Seventh Circuit never articulated an argument for this assertion, and the validity of Cathedral's argument on the matter remained untouched. When conflicting inferences can be drawn from the facts of a case, summary judgment is inappropriate. *Foster v. Johns-Manville Sales Corporation*, 787 F.2d 390, 393 (8th Cir. 1993).

Finally, at issue here is not a plaintiff that sat back for may weeks or months with the knowledge that it's rights may have been violated. *Cf. Metz v. Tootsie Roll Indus. Inc.*, 715 F.2d 299, 304 (7th Cir.1983). *cert. denied* 464 U.S. 1070 (1984) (holding that plaintiff not reasonably diligent when she did not discover for at least twelve months that union failed to file action complaining about her termination within five-day statute of limitations). The relevant delay in Cathedral's situation is a single day. A jury need only find that discovery of Hazel Crest's decision to deny the special use permit — the culmination of a process spanning several months and many meetings — just one day after it occurred falls within the range of reasonable diligence. A rational jury could clearly make that conclusion.

The Seventh Circuit's application of the summary judgment standard to the discovery rule conflicts with that of other Circuits and the misapplication of the standard creates unnecessary forfei-

ture of individual causes of action, as evidenced by Cathedral's situation. This Court should grant the writ in order to establish a uniform rule to be applied by lower courts throughout the country in cases arising under 42 U.S.C. § 1983.

CONCLUSION

For the reasons set forth above, petitioners Cathedral of Joy Baptist Church and Reverend Samuel E. Hinkle respectfully request that this Court grant the Petition for Writ of Certiorari, and provide such other relief that may be appropriate under the circumstances.

DATED: July 20, 1994

Respectfully submitted,
PETITIONERS CATHEDRAL OF JOY BAPTIST CHURCH AND REVEREND SAMUEL E. HINKLE

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 93-1225

CATHEDRAL OF JOY BAPTIST CHURCH and REVEREND SAMUEL E. HINKLE,

Plaintiffs-Appellants,

v.

VILLAGE OF HAZEL CREST, a municipal corporation, and DIANNA J. CHALMERS, RICHARD J. HEBDA, JOHN E. KAINDL, RONALD J. KELLY, JAMES A. LABEAU, KATHLEEN WITT, Individually and as agents of the Village of Hazel Crest,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 3738—**Paul E. Plunkett**, *Judge*.

ARGUED NOVEMBER 16, 1993—DECIDED APRIL 22, 1994

Before POSNER, *Chief Judge*, COFFEY and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. The Rev. Samuel E. Hinkle sought to relocate his Cathedral of Joy Baptist Church to the Village of Hazel Crest, Illinois. The special use zoning permit required for such a relocation was denied by the Board of Trustees of the Village of Hazel Crest on June 28, 1988. Two years and one day later, on June 29, 1990, the church and its pastor filed a civil rights suit

against the Village alleging racial and religious discrimination. On cross-motions for summary judgment, the district court granted judgment in favor of the Village on the ground that the church's claims were time-barred under Illinois' two-year statute of limitations. 735 ILCS 5/13-202. The district court reasoned that the statute began to run when the Village voted to deny the permit on June 28, 1988, and not when the church's agents first learned of the results of the vote three days later, on July 1, 1988. On appeal, the church renews its argument that the "discovery rule" postponed the commencement of the statute of limitations to July 1, 1988. For the following reasons, we affirm.

I. FACTS

The Cathedral of Joy, a church with a predominantly African-American congregation, hoped to relocate to a building once used as a restaurant in the Village of Hazel Crest. The Village's zoning ordinance requires that a special use permit be obtained for the establishment of any church in a zoning district in which churches are an allowed use. Under the zoning ordinance the Village Board of Trustees is authorized to grant a special use permit, but only after (1) a written report on the special use application is produced by the Village's Plan Commission and forwarded to both the Board of Trustees and the Village's Board of Zoning Appeals, and (2) a public hearing on the requested special use has been held by the Board of Zoning Appeals and its findings and recommendations have been reported to the Board of Trustees.

The church had entered into a contract to purchase the former Ponderosa restaurant in Hazel Crest for $240,000.00. According to the purchase agreement, the acquisition of the property by the church was conditioned upon the issuance of a special use permit allowing the property to be used as a church. On April 1, 1988, Rev. Hinkle, on behalf of the church, applied to the Village for the required special use permit. With its application was a request that notice of any hearing or meeting concerning the application be sent to the church's attorney, Thomas Vaughn.

At its regularly scheduled meetings on May 9th and May 16th, 1988, the Hazel Crest Plan Commission reviewed Cathedral's

special use application. On May 9th, Rev. Hinkle and Attorney Vaughn attended the Plan Commission Meeting and were told that their application would be placed on the agenda of the May 16th meeting. On May 16th, Rev. Hinkle and Attorney Vaughn presented their proposal for the use of the building to the Plan Commission. At the conclusion of discussions, the Plan Commission, by a three-to-two vote, recommended to the Village Board of Trustees that the special use permit sought for the church be rejected.

The next day, May 17, 1988, pursuant to published notice, the Hazel Crest Zoning Board of Appeals held a public hearing on the church's requested special use permit. The church was represented at this hearing by Rev. Hinkle and Attorney Vaughn, who presented testimony and argument in support of the special use permit. By a four-to-two vote, the Zoning Board of Appeals recommended to the Village Board of Trustees that the church's application for a special use permit be denied.

The Village Board of Trustees, pursuant to an ordinance adopted by it on January 6, 1988, held public meetings on each Tuesday throughout the year. "Administrative" board meetings (designated as a "committee of the whole") were held on the first and third Tuesdays of each month for the purpose of discussing and reviewing administrative matters, with formal action on those matters to take place at the next "regular" board meeting. "Regular" board meetings were held on the second and fourth Tuesdays of each month for the purpose, among other things, of taking formal action on administrative matters held under review from the previous week's "administrative" board meeting. Both the administrative board meetings and the regular board meetings were open to the public. Notices of the regular board meetings were published in the Village Hall four days before each meeting.

On June 21, 1988, after receiving notice, Rev. Hinkle and Attorney Vaughn attended the administrative meeting of the Village Board of Trustees where the church's special use permit was discussed. During the discussion four of the Village's six trustees indicated that they opposed the use of the restaurant property for a church. The Village President publicly announced that the church's application would be placed on the agenda of the "next

regular Board meeting" and the minutes of that meeting so indicate. Rev. Hinkle and Attorney Vaughn, however, left before the meeting adjourned. According to the published schedule of meetings, the next regular Board meeting following the administrative meeting on June 21st would be held on June 28th.

No written notice of the June 28th meeting was given to Rev. Hinkle or Attorney Vaughn. Public notice of the June 28th meeting of the Village Board of Trustees was posted in the Village Hall four days prior to the meeting. Additionally, the June 26, 1988 edition of an area newspaper, the *Star*, carried as its front page lead headline a news story relating the discussions among Rev. Hinkle, Attorney Vaughn and Village Board members at the June 21st administrative meeting. The article stated that the Village Board announced that it would take action on the church's application at a meeting on Tuesday, June 28, 1988, at 8:00 P.M.

The Village Board of Trustees, at the regular board meeting on June 28, 1988, voted five-to-one to deny the church's special use permit application. No representative of the church was present at that meeting. On July 1, 1988, three days after the Village Board rendered its decision, the church, on the basis of a letter from the Village manager, first learned that its application for the special use permit had been denied.

On June 29, 1990, two years and one day after the decision of the Village Board of Trustees denying the church's special use permit, the church filed this civil rights lawsuit.

II. PROCEDURAL STATUS

In its complaint, the church alleged that the Village's zoning requirement of a special use permit, and the procedure for obtaining one, are used to discriminate against a constitutionally protected class. The complaint further states that the special use permit requirement and approval procedure pose an unreasonable burden on the members of the church in the exercise of their religious beliefs. The Village moved to dismiss the action because the Illinois statute of limitations expired on June 28, 1990, two years after the Village Board's decision—and one day prior to the filing of the church's complaint. The district court declined to grant the motion because

the factual questions presented would not be appropriately resolved on a motion to dismiss.

Eventually, both plaintiffs and defendants filed motions for summary judgment. The district court referred the motions to a magistrate judge who determined that the "discovery rule" was not applicable "because the knowledge of the Board's decision was available to the plaintiffs on June 28, 1988, whether or not they availed themselves of it." The district court adopted the magistrate judge's recommendation, and this appeal followed.

III. DISCUSSION

We review motions for summary judgment *de novo* to determine if there exists a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-52 (1986); *Pro-Eco, Inc. v. Board of Comm'rs*, 956 F.2d 635, 637 (7th Cir. 1992). The record and all inferences drawn from it must be viewed in the light most favorable to the party opposing the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

The sole issue before us for *de novo* review is whether the district court correctly determined that the church failed to file its complaint within the applicable statute of limitations period. Because § 1983 does not provide for a specific statute of limitations, federal courts look to the law of the state where the injury occurred to determine the statute of limitations in a § 1983 case. *Wilson v. Garcia*, 471 U.S. 261, 280 (1985); *Kelly v. City of Chicago*, 4 F.3d 509, 510 (7th Cir. 1993). With regard to this action the applicable period in Illinois is two years. 735 ILCS 5/13-202 (formerly Ill. Rev. Stat. Ch. 110, ¶ 13-202); *Smith v. City of Chicago Heights*, 951 F.2d 834, 839 (7th Cir. 1992).

Generally, a claim accrues when all its elements have come into existence. The "discovery rule," which is read into state statutes of limitations in federal question cases, postpones the beginning of the limitations period of a federal claim from the date the party is injured to the date when the party discovers or should have discovered the injury, exercising reasonable diligence. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990), *cert. de-*

nied, 111 S. Ct. 2916 (1991); *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990). The discovery rule is an exception to the time-bar provision. Thus, the church has the burden of showing that it falls within the exception by demonstrating that even with the exercise of reasonable diligence it could not have known of the purported injury inflicted by the Village on the 28th of June, 1988. *Clift v. United Auto Workers*, 818 F.2d 623, 629 (7th Cir. 1987), *rev'd and remanded on other grounds*, 488 U.S. 1025 (1989); *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986).

An objective inquiry into the facts must be made to determine when a plaintiff should have discovered its injury. *Fries*, 909 F.2d at 1095. In making such an inquiry in this case, we accept the church's assertion that neither Rev. Hinkle nor Attorney Vaughn knew when they left the administrative Board meeting on June 21, 1988, that action on their request for a special use permit had been scheduled for the next regular Board meeting of June 28, 1988. Taking the foregoing as true and examining the undisputed facts, the question for us is, should the church, acting as a reasonably diligent plaintiff, have discovered the denial of the special use permit on the day the Village Board acted, June 28, 1988. The following are the relevant facts that bear directly on the answer to this question.

At each successive meeting of the Plan Commission and the Board of Zoning Appeals, those bodies voted to recommend that the church's special use permit be denied. At the June 21, 1988 administrative meeting of the Board of Trustees, four of the six trustees stated that they opposed the use of the restaurant property for a church.

The ordinance which governed the meeting schedule of the Village Board of Trustees set forth the relationship between administrative Board meetings and regular Board meetings. The ordinance gave notice that administrative matters heard at the administrative Board meeting on the third Tuesday of the month (June 21, 1988) would be scheduled for action at the regular Board meeting held on the fourth Tuesday of the month (June 28, 1988).

For each meeting of a Village body, before which the church was scheduled to make a presentation in support of its request for a special use permit, the church received advance notice of the date and time of the meeting. In this regard, there were the May 9th and 16th meetings of the Plan Commission and the May 17th meeting of the Zoning Board of Appeals. Likewise, the church received advance notice of the June 21st administrative meeting of the Board of Trustees. It was at this administrative meeting that the church was scheduled to make its only presentation to the Board of Trustees.

At the administrative meeting on June 21st Rev. Hinkle and Attorney Vaughn were advised that no further presentation would be permitted by the church at the regular Board meeting at which its request for a special use permit would be addressed. Regular Board meetings were limited to public comment, discussions of such pending matters among the Board of Trustees and a formal vote thereon.

At the administrative meeting of the Village Board on June 21st, the Village President publicly announced that the church's petition for a special use permit would be placed on the agenda for the next regular Board meeting. Nevertheless, when Rev. Hinkle and Attorney Vaughn left the administrative meeting of the Board before adjournment they were unaware of the scheduling of a vote on the church's permit request for the regular Board meeting on June 28th. Rev. Hinkle and Attorney Vaughn did believe, however, that the church's application would be presented at some subsequent Board meeting.

The official minutes of the June 21st administrative meeting state that "President Kauchak directed the petition be placed on the next Regular Board Meeting agenda."

Notice of the regular meeting on June 28, 1988, was posted in the Village Hall four days prior to that date.

A front page article in the *Star* on June 26th featured a story on the church's application to the Village Board and reported that the Board would decide the issue on June 28th. When addressing the Board on June 21st, Rev. Hinkle acknowledged that he was

familiar with the *Star* and that he had followed the stories about the church's application process.

Neither Rev. Hinkle nor Attorney Vaughn contacted or made inquiry of any Village official between June 21st and June 28th to determine when the church's permit application would be acted upon by the Board of Trustees.

Based on the foregoing factors, the church argues that it was reasonable for Rev. Hinkle and Attorney Vaughn to merely await receipt of a notice from the Board regarding the meeting date on which a formal vote would be taken on the church's permit application. This is so, the church claims, because the Village bodies had provided advance notice of the first four meetings and thus the church reasonably expected the Board of Trustees to provide it advance notice of the date on which final action was to be taken on the church's permit request. What was the history of advance notice provided to the church? On May 9th Rev. Hinkle and Attorney Vaughn attended an informal meeting of the Plan Commission and were verbally informed that their application would be placed on the agenda of the formal May 16th Plan Commission meeting. Prior to the May 16th Plan Commission meeting the church received written notice that the Board of Zoning Appeals would address the church's request for a special use permit at its May 17th meeting. A month later, on June 17th, the church received written notice that the Board of Trustees would address the church's permit request at an administrative meeting on June 21st.

Focusing on the past circumstances of advance notification, did the church and its attorney exercise reasonable diligence after June 21st in determining the fate of their special use permit application by doing nothing but waiting for the delivery of a written notice telling them when the Village Board would take action? As we have seen, the facts show that with regard to the four preliminary meetings, in two instances prior written notice of meetings was given, and in two instances only verbal notification of upcoming meetings was provided during the course of earlier meetings.

Thus, the church was aware that prior notification of meetings had come either from written notice or verbally during an earlier meeting. Under these ambiguous circumstances, we do not believe

that the church, and its counsel, exercised reasonable diligence in simply assuming that a written notice of a date for board action would be forthcoming. Rev. Hinkle and Attorney Vaughn left the administrative Board meeting on June 21st prior to adjournment and without any understanding of when the Board would act on their permit request. Based on the comments made by members of the various boards during the successive administrative hearings, the church had ample reason to suspect that its application might ultimately be rejected by the Village Board. Reasonable diligence required that some inquiry should have been made to learn when the Board would act on a matter of substantial significance to the church.

The newspaper article appearing in the *Star* shows that prior to June 26th information was available to the public indicating that the church's special use permit application was set for final determination before the Village Board at 8:00 P.M., on June 28th. Yet no inquiry was made by Rev. Hinkle or Attorney Vaughn on behalf of the church to learn what was already public knowledge.

The church further argues that diligence must be accompanied by reasonable motivation. Thus, it argues that because the church would have no further opportunity to present information to the Board of Trustees following the June 21st administrative meeting, it had no reason to actively pursue a determination of the date the Board would take action on its permit request. It appears, however, just the opposite is true. At all the prior meetings there was required interaction between the church and the various Village bodies. It was, therefore, necessary to have the church present so the various bodies could receive information relative to the special use permit. However, the regular Board of Trustees meeting on June 28th was solely for the purpose of action on the special use permit request. Because the church's presence was unnecessary for the resolution of the matter and adverse action was certainly a possibility, the motivation to determine when the Board action would be taken should have been heightened—not diminished. The church has not carried its burden of proof that the facts allow it to

come within the discovery rule exception to the two-year statute of limitations.[1]

The church contends that the issue of reasonable diligence in discovering its injury is a question of fact for the jury, not the court. However, reasonable diligence may become an issue for the court if the relevant facts are undisputed and only one conclusion may be drawn from them. *Kedzierski v. Kedzierski*, 899 F.2d 681, 683 (7th Cir. 1990) (plaintiff had sufficient information concerning alleged injury and its cause to put him on notice to inquire further); *see also Witherell v. Weimer*, 421 N.E.2d 869, 874 (Ill. 1981) ("Where it is apparent from the undisputed facts . . . that only one conclusion can be drawn, the question becomes one for the court."). Such is the case here. The undisputed facts could lead a rational trier of fact but to one conclusion: the church's failure under the circumstances to make *any* inquiry between June 21st and June 28th as to when the Board of Trustees would act on their special use permit request demonstrated a lack of reasonable diligence.

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1 Taking a more fundamental view, in cases such as the one before us it would appear that the discovery rule may actually be inapplicable. There was, in fact, nothing to be "discovered." Here, a matter of public concern (the special use permit) was submitted by an applicant for consideration by municipal bodies at successive public hearings. The date for final determination was announced publicly and set for a regularly scheduled meeting—a fact which appeared in the news media. The action was taken at the date and time previously announced to the public. In the absence of any effort by the municipal body to take action in a secretive or clandestine manner out of public view or to otherwise hide its action from the applicant, there was nothing to discover. Although not a legal argument advanced by the Village in this case, perhaps a "bright line" rule would be more rational. Under such a theory a legal claim based on a decision of a municipal body made at a scheduled public meeting would accrue at the time the public action is taken.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the grant of summary judgment entered in this case.

A true Copy:
Teste:

Clerk of the United States Court of Appeals
for the Seventh Circuit

Minute Order Form (rev. 12/90)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge	PLUNKETT	Sitting Judge if Other Than Assigned Judge	
Case Number	90C 3738	Date	Jan. 13, 1993
Case Title	CATHEDRAL OF JOY,etc.et al vs. VILLAGE OF HAZEL CREST,et al		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "MOTION" box above]

(2) ☐ Brief in support of motion due _____

(3) ☐ Answer brief to motion due _____ Reply to answer brief due _____

(4) ☐ Ruling/Hearing on _____ set for _____ at _____

(5) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ re-set for _____ at _____

(6) ☐ Pretrial conf. ☐ held ☐ continued to ☐ set for ☐ re-set for _____ at _____

(7) ☐ Trial ☐ Set for ☐ re-set for _____ at _____

(8) ☐ Bench Trial ☐ Jury Trial ☐ Hearing held and continued to _____ at _____

(9) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to
☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)

(10) ☒ [Other docket entry] We hereby adopt and affirm the September 15, 1992 Report and Recommendation of Magistrate Judge Weisberg with certain modifications.

(11) ☒ [For further detail see ☒ order on the reverse of ☐ order attached to the original minute order form.]

☒ No notices required, advised in open court.			number of notices
☐ No notices required.			date docketed
☐ Notices mailed by judge's staff.			docketing dpty. initials
☐ Notified counsel by telephone.			date mailed notice
☐ Docketing to mail notices.			mailing dpty. initials
☐ Mail AO 450 form.			
☐ Copy to judge/magistrate judge.			
courtroom deputy's initials	Date/time received in central Clerk's Office		

Document #

(Reserved for use by the Court)

ORDER

Magistrate Judge Bernard Weisberg entered a report and recommendation on September 15, 1992, which granted the Village's motion for summary judgment and denied the Plaintiffs' motion. The Plaintiff filed an objection and the defendant replied. After reviewing the report and recommendation pursuant to Rule 72, we hereby adopt and affirm its holding with the following modifications.

In its motion, the Village contends that Plaintiffs did not file their claim within the applicable two year statute of limitations. We agree with the Magistrate in that the statute began to run when the Board formally voted at its public meeting on June 28, 1988, and not when the Plaintiffs first discovered the results of the vote three days later. Under the discovery rule, a federal claim does not accrue until the plaintiff either knows, or with reasonable diligence should have known, that there has been an injury. Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990); Nemmers v. United States, 795 F.2d 628, 631 (7th Cir. 1986).

Admittedly, most cases that apply the discovery rule focus on plaintiff's conduct after the injury has occurred. We believe, however, that under the unusual circumstances of this case, reasonable diligence would have required Plaintiffs to ascertain when the vote would be held.

Throughout the application process, the Plaintiffs actively participated in all of the meetings up until the final meeting. However, they did not attend the crucial meeting where the Board formally voted on their application. After the last meeting that they attended, the Plaintiffs had ample reason to suspect the ultimate outcome (namely, that their application would be rejected and that they would be injured). Previous preliminary votes had gone against them and certain village residents and Board members opposed the application. Plaintiffs attended these meetings and were aware of the opposition.

In addition, at the last meeting that the Plaintiffs attended, they were told that the vote would be held at the next regularly scheduled board meeting. Even if they did not know the date of that meeting, they knew that the Board would be voting and could, through minimal effort, have ascertained when that meeting would take place.

A reasonably diligent plaintiff, on notice of a probable injury, would have made efforts to discover the date of the formal vote. These Plaintiffs, however, made no effort to ascertain when that meeting would be held. The Board meetings were on the calendar and posted in public in accordance with local ordinance. They only had to inquire or look at the calendar. As the Magistrate stated, the Plaintiffs were not under any obligation to attend the meeting, yet their absence from the meeting was at their own peril. The accrual date is the date on which the Board voted, since the information was readily available to the Plaintiffs and they were on notice that an injury was likely to occur. Although the three day difference in accrual dates is a short time, the Plaintiffs still had two years ~~less~~ three days during which they could have filed their claim.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CATHEDRAL OF JOY BAPTIST	)	
CHURCH and REVEREND	)	
SAMUEL E. HINKLE,	)	
Plaintiffs,	)	
	)	
vs.	)	No. 90 C 3738
	)	
VILLAGE OF HAZEL CREST,	)	
a municipal corporation, and	)	
MARTIN J. KAUCHAK, DIANNA	)	Judge Plunkett
J. CHALMERS, RICHARD J. HEBDA,	)	
JOHN E. KAINDL, RONALD J.	)	Magistrate Judge
KELLY, JAMES A. LABEAU,	)	Weisberg
KATHLEEN WITT, Individually	)	
and as agents of the Village	)	
of Hazel Crest,	)	
Defendants.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Cathedral of Joy Baptist Church (Cathedral) and its pastor, Reverend Samuel E. Hinkle (Hinkle), brought this civil rights action against the Village of Hazel Crest, an Illinois municipal cor-

poration (Village), alleging that the Village, in denying a special use permit to operate a church in the Village, violated their rights under the Civil Rights Act of 1871, 42 U.S.C. §§ 1981, 1983, and under the First, Fifth and Fourteenth Amendments to the Constitution. Hinkle and his congregation are African-Americans, and the plaintiffs allege that the permit was denied for racial reasons. The sole question before us is the timeliness of this suit, which was filed June 29, 1990. The Village's decision to deny the Church's petition for the permit was made at a meeting of the Village Board of Trustees (Board) on June 28, 1988. Cathedral learned of the decision July 1, 1988. The limitations period is two years. If it began to run at the time of the decision, this suit is barred. Cathedral takes the position that under the discovery rule the limitations period began to run when it became aware of the decision, which would bring the filing date within the limitations period.

The Village filed a motion to dismiss on several grounds including the statute of limitations and the motion was referred to the undersigned for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). In a report dated September 30, 1991 we found that the threshold limitations issue could not be decided because the potential application of the discovery rule raised questions of material fact, and we recommended that the defendants be ordered to file a motion for summary judgment, with discovery to be limited to the limitations issue. On December 4, 1991 Judge Rovner adopted that recommendation and referred the forthcoming motion for summary judgment to the undersigned for a report and recommendation.

Neither this court's recommendation nor Judge Rovner's order set a time limit for the defendants to file their summary judgment motion. After three months had passed, Cathedral filed its own motion for summary judgment, which spurred the defendants to comply with the court's order.

Cathedral's motion must be denied. A summary judgment motion is proper only if it would dispose of an entire claim. See discussions in *Capitol Records, Inc. v. Progress Record Distributing, Inc.*, 106 F.R.D. 25 (N.D. Ill. 1985) (Getzendanner, J.); *SFM Corp. v. Sundstrand Corp.*, 102 F.R.D. 555, 558-59 (N.D. Ill. 1984)

(Shadur, J.); *see also* J. Moore and J. Wicker, 6 (part 2) *Moore's Federal Practice* para. 56.20[3.-2] at 56-691-92 (2nd ed. 1988). Defendants' motion is proper, since granting their motion would result in dismissal. On the other hand, if Cathedral's motion were to be granted, it would mean only that this suit is not time-barred; the plaintiffs would still have to prove that they are entitled to relief. Although Cathedral's motion should be denied for this reason, the submissions offered in connection with that motion will be considered as part of the record in deciding the defendants' motion for summary judgment.[1]

FACTS

On April 1, 1988, Cathedral and Hinkle applied to the Village for a special use permit that would allow a building formerly housing a restaurant to be remodeled and used as a church. Both Hinkle and Cathedral's attorney, Thomas E. Vaughn, attended two public meetings held by the Plan Commission and a third public meeting held by the Zoning Board of Appeals at which the permit application was rejected. Minutes from Plan Commission Meeting, Def. Exh. C and D, p. 1; Minutes of Zoning Board of Appeals, Def. Exh. F, p. 1. Cathedral then appealed to the Board.

The Board placed Cathedral's permit application on the agenda of its June 21, 1988 administrative meeting. Both Hinkle and Vaughn attended this meeting. The Village President said in his affidavit that Hinkle and Vaughn were present at the June 21 meeting when he announced that Cathedral's application would be placed on the agenda of the "next regular Board meeting." Aff. of Martin J. Kauchak, Def. Exh. G, ¶ 5; see Aff. of Timothy J. Gagen, former Village Manager, Def. Exh. J, ¶ 4. The Village President

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1 We understand plaintiffs' frustration in waiting for the defendants to file their summary judgment motion, and in hindsight recognize that the court should have set a deadline for filing the motion. Nevertheless, the proper course was for plaintiffs' counsel to have moved the court to fix a deadline or for a rule to show cause, not a separate and wasteful motion for summary judgment.

was referring to the public meeting scheduled for June 28, 1988, as Board meetings were regularly held on the second and fourth Tuesday of the month. Kauchak Aff. at ¶ 2-3. Kauchak believed Hinkle and Vaughn understood what he said because they were sitting some fifteen feet away and looked directly at him when he made this statement. *Id.* at 5. Hinkle's and Vaughn's presence is confirmed by the minutes of the June 21 meeting. Def. Exh. H, at 2.

Hinkle and Vaughn do not dispute that they were present at the June 21 administrative meeting. Nor do they dispute that Kauchak stated then that Cathedral's application would be on the agenda of the next regular Board meeting. They contend that they were not told when the next Board meeting would be and *when* the permit would be decided. Vaughn Aff., Def. Exh. B, ¶ 5; Hinkle Aff., Def. Exh. I, ¶ 5.[2] Cathedral points to the Village President's using the words "next regular board meeting" to show that the President neither gave the date of the meeting nor indicated whether the meeting had even been scheduled at that point. Vaughn also asserts that the Village did not inform him personally of the upcoming Board meeting when it had done so regarding the administrative meeting (Vaughn Aff., Def. Exh. B., ¶¶ 2, 8).

Contrary to their affidavits, plaintiffs concede in their brief that they knew the permit application was on the agenda of the Board meeting scheduled for "July [sic] 28, 1988." Pl. Br. in Support of Motion for Summary Judgment at 3. Plaintiffs, however, assert that they did not conclusively know that the meeting would take place on June 28, because Board meetings were "subject to cancellation and change." *Id.* Even though meetings could be canceled, Letter from Village Deputy Clerk, Def. Exh. L, public notice of all Board meetings, including the June 28 meeting, was publicized by ordinance at the start of the year and posted in the Village Hall four days before the meeting. Gagen Aff., Def. Exh. J, at 6. In addition, two days before the meeting in question, the Village newspaper, the *Star*, published a front-page story on Cathedral's

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2 The same affidavits were submitted with Cathedral's motion for summary judgment.

permit application, announcing within the first eight lines that the Village Board would vote on the permit application at its meeting "to begin 8:00 p.m. Tuesday [June 28] in village hall." Def. Exh. M.

At the June 28 meeting the Board denied the plaintiff's application. No representative of Cathedral was present. Plaintiffs claim they learned for the first time on July 1, 1988 that the Board had acted on its application when Hinkle read about the decision in a newspaper article and Vaughn received a letter dated June 29, 1988 apprising him of the Board's decision. Hinkle Aff. ¶ 9; Vaughn Aff. ¶ 9.

STANDARD FOR GRANTING SUMMARY JUDGMENT

A motion for summary judgment should be granted only when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding the motion the court must view the record and all inferences drawn from it in the light most favorable to the party opposing the motion. To survive a motion for summary judgment, the nonmoving party who bears the burden of proof on a particular issue must go beyond the pleadings and affirmatively establish, by showing specific facts, that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-324 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250.

We find that there is no genuine dispute that the June 28 meeting date was published and announced to the public and that the plaintiffs and their attorney could have ascertained that date with little effort. Whether the date of the June 28 meeting was announced at the June 21 administrative meeting, or whether plaintiffs or their attorney *actually knew* of the June 28 meeting before it took place are disputed questions of fact. Nevertheless, as we explain below, since it was reasonably possible for the plaintiffs to have learned the date of the meeting, attended, and watched the decision being made, neither the plaintiffs' actual knowledge nor

their subsequent diligence is material. The limitations period began running June 28, 1988.[3]

ACCRUAL OF ACTION

Section 1983 does not contain a limitations provision. Federal courts have been directed to adopt the limitations period for personal injury actions set by the state in which the injury occurred. *Wilson v. Garcia*, 471 U.S. 261 (1985). For § 1983 actions brought in Illinois, the applicable limitations period is the two-year provision governing personal injury actions provided by Ill. Rev. Stat. ch. 110, ¶ 13-202. When a state's statute of limitations is applied, it governs only the limitations period; federal law determines when a federal claim accrues. *Wilson v. Giesen*, 956 F.2d 738, 740 (7th Cir. 1992).

A cause of action ordinarily accrues when all of its elements have come into existence and the plaintiff could maintain a suit against the defendant. An exception is the discovery rule of federal common law, which is read into statutes of limitations in federal question cases unless Congress indicates otherwise. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990). This rule postpones accrual of a federal claim from the date the party is injured to the date the injured party discovers or, by using reasonable diligence, should have discovered that he has been injured, *Id.*; *Nemmers v. U.S.*, 795 F.2d 628, 631 (7th Cir. 1986). Applicability of the discovery rule must be established by the plaintiff. *Drazan v. United States*, 762 F.2d 56, 60 (7th Cir. 1985).

Cathedral argues that its cause of action did not accrue until it teamed of the decision on July 1, 1988, and the discovery of the

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3 The plaintiffs point out that there is a difference between knowledge of the decision denying Cathedral's application and knowledge that the denial was discriminatory. Pl. Response at 2 n. 1. But they concede that the injury here occurred on June 28, 1988. *Id.* at 5. Moreover, the plaintiffs have nowhere offered evidence to show that they learned that the denial was discriminatory at some later time.

Village's decision "just one day after the June 28th meeting (or actually three hours and five minutes)" constitutes reasonable diligence, given that they "had no reason to seek out the date of the meeting" because "Cathedral was told it would not be permitted to make a statement or presentation at the formal meeting." Pl. Response at 10-11. (Plaintiffs miscalculated, since July 1st is actually three days — not one — after June 28.)

In response, the defendants cite several cases in which the date of a decision by a municipal body was taken as the date of accrual of the plaintiff's cause of action, rather than the date the decision was communicated to the plaintiff. The defendants state that in these cases the courts *did* apply the discovery rule, but only considered the date of the decision, not the date the plaintiff learned of it. Def. Br. in Response to Cathedral's Motion for Summary Judgment at 6-9. This apparent non sequitur (how could a court apply the discovery rule if when the plaintiff discovered his injury is irrelevant?) is resolved by defendants' conclusion that notice will be presumed whenever a municipal body acts. "A municipality's legislative action in notice, to the plaintiffs and to the world." Def. Reply at 5.

The cases cited do not, however, announce such a rule. Nor do they reject the application of the discovery rule to the decisions of a municipal council or other legislative body. In most of them the court never mentions when the plaintiff learned of the municipal action complained of. Defendant's inference, that if the time of discovery were relevant it *would* have been mentioned, is plainly wrong. It is only necessary for a plaintiff to invoke the discovery rule if his cause of action would be barred counting from the time of the municipal action, but not from the date he became aware of it. Since we assume most municipal bodies attempt to give prompt notice to those affected by their decisions, such cases must be very rare. None of the cited cases supports the defendants' position.

National Advertising Co. v. City of Raleigh, 947 F.2d 1158 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1997, 112 L. Ed. 2d 593 (1992), was a § 1983 suit for an unconstitutional taking of property based on a municipal ordinance that required some of the plaintiff's billboards to be removed after a 5-1/2 year amortization period.

The court stated that the plaintiff's cause of action accrued when the plaintiff knew or had reason to know of the injury, *id.* at 1162, and ruled that the limitations period commenced at the time the ordinance was passed; the injury occurred then because plaintiff's signs became nonconforming uses with a newly limited useful life.

In *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990), the defendant had enacted three ordinances in 1977 that substantially interfered with the development of the plaintiff's property. The plaintiff challenged the ordinances in state court. The state court invalidated them, the decision was upheld when the appeal was decided in 1983, but a stay pending appeal left the ordinances in effect until the appeal was decided. The plaintiff then sued in federal court for the taking of his land without compensation for the period the ordinances were in effect.

The defendant contended that the claim was untimely because it accrued when the ordinances had been passed, but the district court and the Eleventh Circuit agreed that the plaintiff's federal claim accrued at the time the appeal was decided. The rule there stated, that "under federal law, taking claims do not ripen until planning authorities and state review entities have made a final determination on the status of the subject property," *id.* at 588, cannot be read as excluding the discovery rule. If state authorities met privately or the times of their meetings were not generally available, and their decisions were not publicized, it would be reasonable for the limitations period to run from the time the plaintiff was notified of the decision.

Sullivan v. City of Pittsburgh, 811 F.2d 171, 180 (3rd Cir. 1987), held that a suit challenging a zoning decision was timely filed, counting from the time the Pittsburgh City Council rejected the applications. There was no mention of when the plaintiff learned of the decision.

Peter Henderson Oil Co. v. City of Port Arthur, 806 F.2d 1273, 1275 (5th Cir. 1987), held that the plaintiff's cause of action accrued when the city of Port Arthur granted it a special use permit conditioning drilling activities on the consent of neighboring landowners. The court stated that the ordinance granting this permit was "explicit, unambiguous notice." *Id.* Nevertheless, there is no

indication that the plaintiffs sought to invoke the discovery rule, nor could they have. The limitations period was two years and the ordinance was passed more than five years before suit was filed. The plaintiffs could hardly have asserted that it took three years of diligent effort to discover it.

Norco Construction, Inc. v. King County, 801 F.2d 1143 (9th Cir. 1986), another suit for damages for a temporary taking, held that the plaintiff's federal cause of action accrued only when the county authority had made a final decision, not when the county deferred action on the plaintiff's plat plan. Again, there was no question of when the plaintiff learned of the final decision.

McMillan v. Goleta Water Dist., 792 F.2d 1453, 1456-57 (9th Cir. 1986), held that the plaintiffs' claim for denying them connection to water mains matured when the water district denied their application for a discretionary exception to a moratorium on connections. The Court of Appeals reversed the district court's holding that their cause of action accrued much earlier, at the time they realized, or should have realized, that the ordinance's moratorium was more than merely a temporary measure. The district court's error was not in applying a discovery rule as such, but in taking the wrong event as the starting point. There was no question that, taking the water district's decision as the point at which the plaintiffs' cause of action accrued, the suit was timely.

de Botton v. Marple Township, 689 F. Supp. 477 (E.D. Pa. 1988), considering a § 1983 claim for a temporary taking pending the litigation of a zoning appeal, stated that the plaintiff's claim accrued on the date he knew or had reason to know of the injury. This, the court found, was the date of the original zoning decision, but further held that the subsequent state court litigation tolled the statute. While the latter holding conflicts with the Court of Appeals decisions discussed above, this is irrelevant to the issue at hand; the court apparently assumed that the discovery rule could apply to a § 1983 suit predicated upon municipal legislative action.

Human Development Services of Port Chester v. Village of Port Chester, No. 86 Civ. 9419, 1988 WL 9950 (S.D.N.Y. Feb. 1, 1988), held that the limitations period for challenging a municipal zoning board decision runs from the date of the decision and not

from the date of its statutorily required filing with the village clerk. The plaintiff did not attempt to invoke the discovery rule and there was no mention of when the plaintiff had notice of the decision.

So far as we are aware, under Illinois law actions of a municipal body taken at a public meeting and recorded in the minutes thereof are not treated like recorded deeds — public records of which all are deemed to have constructive notice.[4]

In any event, even if Illinois law held that the public has constructive notice of the unpublished decisions of municipal bodies, this would not automatically determine when the limitations period begins to run in a *federal* action, a matter of federal law.

We agree with defendants, however, that the plaintiffs had constructive notice of the meeting *date* (though not the action taken at the meeting) because it was published in accordance with law. Even if publication did not give the plaintiffs constructive notice of the meeting date, once they knew that the Cathedral's application would be decided at the next meeting, they could easily have inquired when that meeting would be held. No such inquiry is alleged, nor is it alleged that an inquiry would have been futile.

It is this, rather than any presumption of notice, that sinks the plaintiff's case. The burden of establishing the applicability of the discovery rule is on the plaintiffs. For the discovery rule to apply, the plaintiffs must show that knowledge of the Board's decision was not reasonably available to them at the time of the decision. Only if that information was not available is it necessary to consider whether the plaintiffs were sufficiently diligent thereafter.

The availability of information to the plaintiff determines the applicability of the discovery rule. The discovery rule is an exception to the general principle that the limitations period begins

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4 *DuMond v. City of Mattoon*, 60 Ill. App. 2d 83, 87, 207 N.E.2d 320, 322 (4th Dist. 1965), stated that citizens have constructive notice of local ordinances, but the denial of a special use permit does not appear to be an ordinance.

to run at the time the cause of action accrues, *i.e.*, at the time the last element of the plaintiff's cause of action comes into existence, permitting him to maintain a suit. In tort claims this will be the plaintiff's injury. It is possible, however, particularly in cases of medical malpractice, that only months or years after an injury does the victim manifest symptoms that would lead him to discover the injury and its cause. If the limitations period has run, the victim has been deprived of a remedy through no fault of his own.

Courts created the discovery rule exception to address this apparent injustice. In *United States v. Kubrick*, 444 U.S. 111 (1979), the Supreme Court distinguished between lack of knowledge of the existence and cause of the injury and ignorance of any legal right to redress, holding that only the former delayed the running of the limitations period. This was so because only the former was beyond the plaintiff's control:

> That he had been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain.

Id. at 122. Once a plaintiff knows the facts, informing himself of his legal rights is within his power, and he does not need the protection of the discovery rule. "Until the victim has a reasonable opportunity to discover the cause, or a potential cause [of his injury] the tortfeasor must bear the consequences. Once knowledge of the cause is available, any delay in pursuing the cause and developing a case rests with the would-be plaintiff." *Nemmers*, 795 F.2d at 632.

The discovery rule does not apply here because the knowledge of the Board's decision was available to the plaintiffs on June 28, 1988, whether or not they availed themselves of it. It is undisputed that Hinkle and Vaughn could easily have determined the time and location of the meeting and attended it; therefore knowledge of that decision was reasonably accessible to the plaintiffs at the time it was made. This distinguishes this case from employment discrimination cases such as *Cada* and *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), holding that the limitations

period begins to run when the adverse decision is communicated to the employee. Employment decisions are not normally made in public and employees have no way of learning of them until they are told.

If the discovery rule does not apply, it is beside the point to argue, as Hinkle and Cathedral do, that it was reasonable for them not to attend the meeting and to wait three days to find out what the Board had decided. Their behavior was entirely reasonable — but no reason to stop the clock. The plaintiffs could choose to find out later what happened at the meeting, but the Village should not lose the protection of the limitations period because of plaintiffs' choice. The limitations period began to run once they had a reasonable opportunity to discover all of the essential elements of his cause of action, and that happened on June 28, 1988.

Plaintiffs argue that the purpose of the statute of limitations, protection against stale claims, would not be served by enforcing it under these circumstances. Pl. Response at 11, 12. It is harsh to reject a claim because it is two days late, but that is how statutes of limitations work. There would be little point to statutes of limitations if plaintiffs could argue that they should be excepted from their operation because of the merits of their case, or because the delay has not been enough to prejudice the defendant. Plaintiffs had two years, less the three days they waited, to learn of the Board's decision. That is ample time by any reckoning. Plaintiffs' counsel's references to the alleged discriminatory practices of the Village, Pl. Br. at 12, mentioning unnamed documents not in the record, are irrelevant to the issue at hand and therefore improper.

CONCLUSION

We conclude that there is no dispute that the Village Board denied Cathedral's application on June 28, 1988 and the plaintiffs could have brought suit immediately thereafter. There is also no dispute that the date and time of the meeting had been published and that this information was reasonably available to the plaintiffs before that date. The limitations period began to run on June 28, 1988. Accordingly, we recommend that the Village's motion be granted and plaintiffs' motion denied.

Under 28 U.S.C. § 636(b)(1) the parties have 10 days from the date of service hereof to file written objections to this Report and Recommendation with Judge Plunkett. Failure to file such objections will normally waive the right to appeal the rulings set forth in this Report. *Egert v. Connecticut General Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir. 1990).

Respectfully submitted,

Bernard Weisberg
United States Magistrate Judge

Date: September 15, 1992

cc: All Attorneys of Record
(See Attached Service List)

(2)

Supreme Court, U.S.
FILED
AUG 19 1994
OFFICE OF THE CLERK

No. 94-145

In The

Supreme Court of the United States

October Term, 1994

CATHEDRAL OF JOY BAPTIST CHURCH and REVEREND SAMUEL E. HINKLE,

Petitioners,

v.

VILLAGE OF HAZEL CREST, a municipal corporation, and DIANNA J. CHALMERS, RICHARD J. HEBDA, JOHN E. KAINDL, RONALD J. KELLY, JAMES A. LABEAU, KATHLEEN WITT, individually and as agents of the Village of Hazel Crest,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

Respondents Village of Hazel Crest, Illinois, *et al.*, oppose issuance of a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this proceeding. Petitioners' brief in support of their Petition for Writ of Certiorari is replete with misstatements and misrepresentations of facts, law and prior proceedings. Counsel for respondents are, therefore, obligated to present this Brief in Opposition. S.Ct. Rule 15.1.

OPINION BELOW

Petitioners' brief misstates the Opinion of the Court of Appeals for the Seventh Circuit in this proceeding. The reprinted Opinion in the Appendix to Petitioners' brief does not reflect the Order issued by the Court of Appeals on May 13, 1994, which amended the Opinion issued April 22, 1994. That Order is reprinted in the Appendix to this Brief at A-1, and the full, corrected text of the footnote which that Order amended is reprinted at A-2. The amended Opinion of the Court of Appeals is correctly reported at *Cathedral of Joy Baptist Church v. Village of Hazel Crest*, 22 F.3d 713 (7th Cir. 1994).

STATEMENT OF THE CASE

This is a purported civil rights action brought by the Cathedral of Joy Baptist Church and Reverend Samuel E. Hinkle (hereinafter jointly referred to as "Cathedral")

against the Village of Hazel Crest and its six trustees, both individually and as agents of the Village (hereinafter collectively referred to as the "Village"), for not issuing a special use permit allowing Cathedral to turn a commercially-zoned Ponderosa Restaurant building into a church. Cathedral submitted its application for a special use permit to the Village on April 1, 1988. (R.73, p.3, ¶1, R.80, Ex.A) Subsequently, the Village's Plan Commission and Zoning Board of Appeals held public meetings and a hearing at which Cathedral and its attorney were present and participated. (R.80, Ex.E, F). Both the Plan Commission and the Zoning Board recommended that Cathedral's application be denied. *Id.* The full Board of Trustees of the Village then reviewed Cathedral's special use application, first at a regularly-scheduled, open, public administrative ("Committee of the Whole") meeting on June 21, 1988, which Cathedral and its attorney attended, (R.80, Ex.H, pp.1-3) and a week later at a regularly-scheduled, open, public Village Board meeting on June 28 at which the Trustees took formal, final legislative action to deny Cathedral's special use application. (R.80, Ex.N, pp.2-3)

More than two years after the Village Board took open, formal, final legislative action denying Cathedral's special use application, Cathedral filed its first complaint in this case, alleging that the Village's denial discriminated against Cathedral on the basis of race and religion. (R.1) In response to Cathedral's second amended complaint, the Village filed a motion to strike and dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (R.28) In addition to challenging the legal basis of each count of the second amended complaint, the

Village's motion also asserted, as an affirmative defense, that Cathedral's initial complaint was not filed within the two-year period allowed by the applicable statute of limitations. (R.28, Def. Memo, pp.2-3)

Then District Judge Ilana Diamond Rovner referred the Village's motion to Magistrate Bernard Weisberg for review and recommendation. (R.49) Magistrate Weisberg recommended that the Village's motion to dismiss be continued generally, that a motion for summary judgment be filed on the statute of limitations defense, and that discovery be limited to the statute of limitations issue. (R.58) Judge Rovner adopted the report and recommendation of the Magistrate. (R.70, 71) Cathedral and the Village then brought and briefed cross-motions for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. (R.73, R.77) Those motions were referred to Magistrate Weisberg. (R.72)

The Magistrate's report on the motions for summary judgment found that the applicable statute of limitations period began to run on the day the Village Board of Trustees formally denied Cathedral's special use permit application, and that Cathedral did not file its initial complaint in this case until after the applicable two-year limitations period had run. (R.43) The Magistrate recommended that the Village's motion for summary judgment on its statute of limitations defense be granted, and that Cathedral's summary judgment motion be denied. (R.94)

District Judge Paul E. Plunkett, to whom this case had been assigned following the elevation of Judge Rovner to the Court of Appeals, affirmed and adopted

the Magistrate's report and recommendation, additionally noting that Cathedral's purported injury accrued on the date on which the Village Board voted because the result of that vote was readily available to Cathedral, and Cathedral was on notice that what it considered to be an injury was likely to occur. (R.108)

Cathedral appealed the District Court's decision to the Court of Appeals for the Seventh Circuit. On April 22, 1994, a panel of the Seventh Circuit, consisting of Chief Judge Posner, Judge Coffey, and Judge Kanne, issued a decision affirming the District Court's grant of summary judgment in favor of the Village because Cathedral did not meet the reasonable diligence requirement of the "discovery rule", and because application of the "discovery rule" is inappropriate in cases where the injury complained of is the decision of a municipal body made at a scheduled public meeting. *Cathedral of Joy v. Village of Hazel Crest*, 22 F.3d 713 (No. 93-1225, 7th Cir. Op. dated April 22, 1994 and amended by Order dated May 13, 1994).

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT RAISE THE QUESTIONS PRESENTED IN THE PETITION.

A. The "Discovery Rule" Was Properly Stated and Applied.

The first Question Presented in the petition (pp.i, 3) is whether a Circuit split was created by the Seventh Circuit's purported holding that the "discovery rule", as

applied in race discrimination actions arising under 42 U.S.C. §1983, requires that the applicable statute of limitations begin to run when the claimant "anticipates" injury, as opposed to when the claimant should reasonably discover such injury. This mind-boggling concept is nowhere stated, or even suggested, in the Seventh Circuit's decision below. The Court's decision does not indicate or imply in any manner that the discovery rule is or should be applied differently in race discrimination actions arising under Section 1983 than in any other civil action. Furthermore, the Seventh Circuit does not in any way state, indicate or suggest that the discovery rule requires that the applicable statute of limitations begin to run when the claimant "anticipates" that he will be injured rather than when he should have reasonably discovered his injury.

The rule of law applied by the Seventh Circuit in this proceeding is clearly stated in its decision:

> The "discovery rule," which is read into state statutes of limitations in federal question cases, postpones the beginning of the limitations period of a federal claim from the date the party is injured to the date when the party discovers or should have discovered the injury, exercising reasonable diligence. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2916, 115 L.Ed.2d 1079 (1991); *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990).

22 F.3d at 717. The same standard for the "discovery rule" is applied in all the circuit court cases cited by petitioners. *See, Morse v. University of Vermont*, 973 F.2d 122, 125 (2nd Cir. 1992); *Rivera-Muriente v. Agosto-Alicea*, 959

F.2d 349, 353 (1st Cir. 1992); *Vernow v. Vicks Market*, 896 F.2d 43, 46 (3rd Cir. 1990); *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987); *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1384 (10th Cir. 1985); *Marrapese v. State of Rhode Island*, 749 F.2d 934, 936 (1st Cir. 1984); *McWilliams v. Escambia County Sch. Bd.*, 658 F.2d 326, 330 (5th Cir. 1981); *Lavellee v. Listi*, 611 F.2d 1129, 1131 (5th Cir. 1980).

Obviously, the decision below does not create any split among the Circuits as to the substance of the discovery rule. If it were the intent of the Seventh Circuit to hold that the applicable statute of limitations period begins to run when a claimant "anticipates" that he will be injured, rather than when the purported injury is or can be discovered, then it would have held that the statute of limitations period began to run on the date of the administrative meeting of the Village's Board of Trustees, at which time four of six Village Trustees directly stated to Cathedral's representatives that they did not favor Cathedral's request for a special use permit (R.80, Ex.H, pp.1-3). Indeed, if the Seventh Circuit wanted to apply an "anticipation" standard, it could have ruled that the applicable statute of limitations period began to run when one or both of the Village's advisory boards which reviewed Cathedral's special use request had recommended denial (R.80, Ex.D, p.2, Ex.F, p.44).

Rather, the Seventh Circuit held, contrary to petitioner's contentions, that Cathedral's purported injury occurred on the date the Village's Board of Trustees took final, formal legislative action denying Cathedral's special use application at an open, regularly-scheduled public meeting on June 28, 1988. 22 F.3d at 717. Further, the

Seventh Circuit held that Cathedral should have discovered its purported injury on that date because Cathedral was on notice that a final, formal adverse action on its special use application was imminent, and because, as the record below clearly shows, Cathedral's representatives were personally informed at the Village Board's administrative meeting that action would be taken on the application at the "next regular Board Meeting" to be held on June 28, 1988 (R.80, Ex.H, pp.1-3). 22 F.3d at 718.

The Seventh Circuit's application of the discovery rule in this proceeding is neither unjust nor contrary to the application of the discovery rule by other Circuits. As pointed out in the decision below:

> The discovery rule is an exception to the time-bar provision. Thus [Cathedral] has the burden of showing that it falls within the exception by demonstrating that even with the exercise of reasonable diligence, it could not have known of the purported injury inflicted by the Village on the 28th of June, 1988.

22 F.3d at 717, citing *Clift v. United Auto Workers*, 818 F.2d 623, 629 (7th Cir. 1987), *rev'd and remanded on other grounds*, 488 U.S. 1020, 1025 (1989); *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986). The Ninth Circuit has stated that when factual information indicating or demonstrating a litigable injury is publicly available, and a would-be plaintiff is on notice of facts that would excite its inquiry, then that plaintiff is deemed to have knowledge of the injury. *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 858 F.2d 499, 503-04 (9th Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989). As pointed out by the Court of Appeals for the Fifth Circuit, the standard of reasonable diligence:

> imposes an affirmative duty on the potential plaintiff. Plaintiff is not permitted a "leisurely discovery of the full details of the alleged [injury]". [Citation omitted.] A plaintiff who has learned facts that would cause a reasonable person to inquire further must proceed with a reasonable and diligent investigation, and is charged with the knowledge of all facts such an investigation would have disclosed.

Jensen v. Snellings, 841 F.2d 600, 607 (5th Cir. 1988). Hence, no Circuit split in the application of the discovery rule has been created by the decision below.

This is not a case where the purported injury consisted of a decision made by a committee at a private meeting which the claimant could not attend, which was the case in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Nor is this a case where the purported injurious decision was made by a single individual administrative official in the confines of his office, and therefore could not immediately be known by the claimant, as was the case in *Morse v. University of Vermont*, 973 F.2d 122 (2nd Cir. 1992).

The supposed injurious legislative action taken against Cathedral was taken at a regularly-scheduled, open, public Village Board Meeting, of which Cathedral's representatives were put on notice. Pursuant to the Illinois Open Meetings Act, 5 ILCS 120, the schedule of regular meetings of the Village Board of Trustees was set and published early in the calendar year (R.80, Ex.L). Furthermore, notice of the April 28, 1988 Village Board Meeting was posted at the Village Hall and published in a local newspaper several days in advance. All citizens,

including Cathedral's representatives, were therefore informed as to when the Village Board would take official action.

As this Court has pointed out on more than one occasion, all citizens are presumed to know of legislative actions which affect their interests. *Hodel v. Irving*, 481 U.S. 704, 733 (1987) (J. Brennan concurring); *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman, et al.*, 268 U.S. 276, 283 (1925). This presumption is particularly appropriate in a case such as the instant one where the legislative action complained of was the culmination of a legislative process which the claimant initiated by petitioning for a special use approval, and in which claimant participated. It was not an action which was unexpected or in which Cathedral had no involvement, or which was in any way hidden from claimants' immediate and first-hand knowledge.

The outcome in the case at bar is substantially similar to that in *Peter Henderson Oil Co. v. City of Arthur, Texas*, 806 F.2d 1273 (5th Cir. 1987), which was cited by the Seventh Circuit in its May 13, 1994 Order amending its April 22, 1994 Opinion in this case (the Order which, as noted above, petitioners failed to notify this Court of). In *Henderson Oil*, the claimant had sought a specific zoning approval from the defendant municipality that would allow drilling for oil at a particular location. The zoning approval was granted, but with a condition which the claimant found objectionable. Nevertheless, the claimant did not seek to challenge the constitutionality of the objectionable condition until more than five years later. The court found that the applicable statute of limitations provided a two-year period in which to bring a federal

civil rights action pursuant to 42 U.S.C. §1983. The court then noted the general discovery rule that "Section 1983 actions accrue when the injured party knows or has reason to know of the injury which forms the basis for the action," 806 F.2d 1275, and went on to hold that the claimant was given explicit, unambiguous notice of the objectionable condition on the date the ordinance was passed by the city council. Its claim was, therefore, time-barred. *Id.*

B. Summary Judgment Was Properly Granted.

The second question presented by petitioners (pp.i, 10) is whether the Seventh Circuit's application of the summary judgment standard in its decision below is inconsistent with the application of the same standard by other Circuits. Specifically, petitioners charge that the Seventh Circuit ignored material issues of fact that exist in the record. This contention is without merit and belies petitioners' positions and arguments in prior proceedings in this matter.

As petitioners point out in their brief, Cathedral was the first party to move for summary judgment on the Village's statute of limitations defense. In the memorandum in support of that motion, Cathedral contended, as it does in its brief to this Court, that affidavits of Cathedral's representatives and affidavits of the Village's Trustees conflict as to whether Cathedral was given personal notice of the April 28, 1988, meeting of the Village Board at which final legislative action was taken on Cathedral's application for a special use. Nevertheless, in its memorandum in support of its motion for summary

judgment, Cathedral stated: **"This factual controversy, however, is not material"** (R.73, p.2). Cathedral went on in its memorandum to state, *arguendo*, that "Cathedral was aware that its special use request was on the agenda of the Board Meeting scheduled at 8:00 p.m. on July 28, 1988" (R.73, p.3). For Cathedral to now suggest to this Court that a controversy exists as to a genuine issue of material fact is utterly without credibility.

In the context of the summary judgment motion on a statute of limitations defense, the plaintiffs' burden is to present evidence sufficient to allow a jury to return a verdict in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). This Court has made it clear that the "plain language of Rule 56(e) [of the Federal Rules of Civil Procedure] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party . . . bear[s] the burden of proof. . . . In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

As previously noted, petitioners have conceded that there is no genuine issue of material fact in this case. Thus, the Seventh Circuit, on *de novo* review, was justified in determining whether the Village was entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986). The Seventh Circuit fairly held that, based upon the undisputed material facts, Cathedral had not exercised reasonable diligence, and therefore had

not met its burden of showing that it came within the discovery rule exception to the applicable two-year statute of limitations. 22 F.3d at 719.

Petitioners' suggestion that Cathedral did not have reason to suspect that the Village's Board of Trustees would deny its application for a special use at the June 28 meeting because "Cathedral just as easily could have anticipated there was a chance that at least one Trustee would change his mind, **leaving the vote tied and sustaining their application**" (Pet.Br., p.14, emphasis added) is a false and absurd statement. Under Illinois law, a proposed special use which fails to receive the favorable recommendation of a Plan Commission must be approved by "a favorable majority vote of all . . . trustees of the municipality then holding office". 65 ILCS 5/11-13-1.1. Thus, it would have taken the favorable vote of four of six of the Village's Trustees in order for Cathedral's application for special use to be approved. A tie vote would not have "sustained" Cathedral's application. Furthermore, petitioners point to nothing in the record that indicates one or more of the Village Trustees adverse to Cathedral's application was likely to change his or her mind.

Likewise, petitioners' argument that it could be reasonably inferred that Cathedral could have anticipated receiving written notice of the June 28, 1988, meeting of the Village Board is without credibility. As pointed out by the Seventh Circuit, Cathedral had received written notice of only two of four prior meetings with Village bodies (22 F.3d at 718). That is hardly a record worthy of reliance. Additionally, as noted above, Cathedral has conceded that any factual controversy as to whether it was

given notice of the June 28, 1988 meeting of the Village Board "is not material" to the determination of the issues in this case. Thus, it was completely fair and reasonable for the Seventh Circuit to conclude that reasonable diligence was not exercised by Cathedral's representatives by waiting to receive such a notice. 22 F.3d at 719.

II. THE SEVENTH CIRCUIT'S DECISION IS PLAINLY CORRECT AND SHOULD NOT BE REVIEWED.

Statutes of limitation represent a legislative judgment which affords plaintiffs a reasonable time to present their claims, while protecting defendants and the courts from having to deal with cases in which the search for the truth may be seriously impaired by the loss of evidence, disappearance of witnesses, fading memories and disappearance of documents. *United States v. Kubrick*, 444 U.S. 111, 117 (1979). Statutes of limitation are to be strictly construed. *Id.*, 444 U.S. at 117-18. The applicable limitations period in this case was not a term of days or months. Rather, it was a term of years. What Cathedral is requesting, in essence, is that the running of the applicable limitations period be tolled for a day. While the request may seem minor, it is important to note, as District Judge Plunkett did below, that Cathedral had two years in which to file a complaint, and it failed to do so.

To hold that the statute of limitations period for a claim stemming from a legislative action does not begin to run until the affected party obtains specific knowledge of that action will effectively give the affected party discretion to determine when its cause of action accrued,

particularly when, as in the instant case, the legislative body had no obligation to give specific notice of its action to the affected party. In the instant case, one of Cathedral's representatives, Reverend Hinkle, avers that he learned of the Village Board's denial of Cathedral's special use request from a newspaper article he read on July 1, 1988 (R.80, Ex.I, ¶9). What if he had not bothered to read that article or otherwise inform himself of the Village Board's action until the following day? Or the following month? Or the following year? Cathedral's contention is that it could delay the accrual of its purported cause of action until it chose to inform itself that the Village Board denied its application. This contention is contrary to the purpose of statutes of limitation.

As the Seventh Circuit pointed out in a footnote to its decision in this case (a footnote which petitioners did not properly restate in the appendix to their brief, but which is properly restated in the appendix to this brief), the "discovery rule" really has no applicability in this case because

> [t]here was, in fact, nothing to be "discovered." Here, a matter of public concern (the special use permit) was submitted by an applicant for consideration by municipal bodies at successive public hearings. The date for final determination was announced publicly and set for a regularly-scheduled meeting – a fact which appeared in the news media. The action was taken at the date and time previously announced to the public. In the absence of any effort by the municipal body to take action in a secretive or clandestine manner out of public hearing, or to otherwise hide its actions from the applicant, there was nothing to discover.

22 F.3d at 719, n.1.

It simply cannot be a hardship for the proponent of a zoning petition before a municipality to actively monitor its progress, any more than it is a hardship for a proponent of a legal claim to actively monitor the time and place of judicial proceedings thereon. In this case, Cathedral's representatives, one of whom was an attorney specifically retained for this purpose, were remiss in not actively following the progress of their application before the Village to its final conclusion. Cathedral now seeks to lay blame on the Village for the carelessness and neglect of its representatives. To do so would be improper and unjustified.

CONCLUSION

The Seventh Circuit properly applied the "discovery rule" and the standards for summary judgment in this case. A correct and just result was reached. Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

May 13, 1994.

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

CATHEDRAL OF JOY BAPTIST CHURCH and REVEREND SAMUEL E. HINKLE, Plaintiffs-Appellants,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 93-1225 vs.	No. 90 C 3738
VILLAGE OF HAZEL CREST, a municipal corporation, and DIANNA J. CHALMERS, RICHARD J. HEBDA, JOHN E. KAINDL, RONALD J. KELLY, JAMES A. LABEAU, KATHLEEN WITT, individually and as agents of the Village of Hazel Crest, Defendants-Appellees.	Paul E. Plunkett, *Judge*

ORDER

It is hereby ORDERED that the opinion in this case issued April 22, 1994, is amended as follows:

On page 11, footnote 1, lines 12 and 13, "Although not a legal argument advanced by the Village in this case, perhaps" is stricken and replaced by "Perhaps". Also at the end of footnote 1 inset "*See, Peter Henderson Oil Co. v. City of Port Arthur, Tex.*, 806 F.2d 1273, 1275 (5th Cir. 1987)."

The amended footnote reads as follows:

1. Taking a more fundamental view, in cases such as the one before us it would appear that the discovery rule may actually be inapplicable. There was, in fact, nothing to be "discovered." Here, a matter of public concern (the special use permit) was submitted by an applicant for consideration by municipal bodies at successive public hearings. The date for final determination was announced publicly and set for a regularly scheduled meeting – a fact which appeared in the news media. The action was taken at the date and time previously announced to the public. In the absence of any effort by the municipal body to take action in a secretive or clandestine manner out of public view or to otherwise hide its action from the applicant, there was nothing to discover. Perhaps a "bright line" rule would be more rational. Under such a theory a legal claim based on a decision of a municipal body made at a scheduled public meeting would accrue at the time the public action is taken. *See, Peter Henderson Oil Co. v. City of Port Arthur, Tex.*, 806 F.2d 1273, 1275 (5th Cir. 1987).